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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 288

WILLIAM E. BAKER AND MARTHA D. BAKER,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 4–13) is reported at 4 T. C. 307. The opinion of the Circuit Court of Appeals (R. 18–22) is reported at 149 F. 2d 342.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 10, 1945 (R. 22), and the petition for a writ of certiorari was filed on August 1, 1945. This Court has jurisdiction under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether Section 22 (a) of the Internal Revenue Code, as amended by Section 3 of the Public Salary Tax Act of 1939, is constitutional in so far as it provides for taxing compensation paid to a judge of a District Court of the United States who qualified for the office on April 3, 1921.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

ARTICLE I

SECTION 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises * * *

* * * * *

ARTICLE III

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

AMENDMENT 16

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment

among the several States, and without regard to any census or enumeration.

Public Salary Tax Act of 1939, c. 59, 53 Stat. 574:

> SEC. 3. Section 22 (a) of the Internal Revenue Code is amended by adding at the end thereof a new sentence to read as follows: "In the case of judges of courts of the United States who took office on or before June 6, 1932, the compensation received as such shall be included in gross income" (26 U. S. C. Sec. 22).
>
> SEC. 209. In the case of the judges of the Supreme Court, and of the inferior courts of the United States created under article III of the Constitution, who took office on or before June 6, 1932, the compensation received as such shall not be subject to income tax under the Revenue Act of 1938 or any prior revenue Act.

STATEMENT

The petitioner William E. Baker, referred to in this brief as the taxpayer,[1] qualified for the office of judge of the District Court of the United States for the Northern District of West Virginia on April 3, 1921, and since that time has continued in office and performed its functions (R. 15).

In each of the years 1939, 1940, and 1941, the taxpayer received for his services as judge the

[1] Martha D. Baker, the taxpayer's wife, is co-petitioner since joint returns were filed for the years in question (R. 14).

aggregate amount of $10,000, as provided by law (R. 15). In his returns for those years, the taxpayer disclosed the receipt of those payments, but claimed that they were exempt from tax, and did not include them in gross income or pay any tax on them. If they were not includible in his gross income, he had no taxable income in any of the years involved. (R. 15.) The Commissioner included the payment in the taxpayer's gross income for each of the years 1939, 1940, and 1941, and accordingly determined a deficiency in income tax for each year (R. 14, 15). The Commissioner's determinations were sustained by the Tax Court (R. 4–12) and by the court below (R. 18–22).

ARGUMENT

1. The court below correctly decided that this case is controlled by *O'Malley* v. *Woodrough*, 307 U. S. 277, and not by *Evans* v. *Gore*, 253 U. S. 245. Like Judge Woodrough and unlike Judge Evans, the taxpayer was subject to federal income tax on his compensation at the time he qualified for office.

When the taxpayer qualified for office on April 3, 1921 (R. 15), Section 213 (a) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, required that compensation received as a federal judge be included in gross income for purposes of determining the amount of the Federal income tax. Section 213 (a) of the Revenue Act of 1921, c. 136, 42 Stat. 227, approved on November 23, 1921,

retained this provision; Section 200 (1) thereof made the tax applicable to the calendar year 1921 and subsequent years. Thus the tax remained continuously in effect although Section 1400 (a) of the Revenue Act of 1921 repealed the income-tax provisions of the Revenue Act of 1918, as of January 1, 1921. The provision for taxing the salaries of federal judges was also carried into Section 213 (a) of the Revenue Acts of 1924 and 1926. While it was omitted from the Revenue Act of 1928, this was done because Congress believed that the salaries of federal judges were included within the general definition of gross income in Section 22 (a) thereof, to the extent that the Constitution permitted them to be taxed. H. Rep. No. 2, 70th Cong., 1st Sess., p. 13 (1939–1 Cum. Bull. (Part 2) 384, 392); S. Rep. No. 960, 70th Cong., 1st Sess., p. 19 (1939–1 Cum. Bull. (Part 2) 409, 422).

Under the decision in *O'Malley* v. *Woodrough, supra,* the provision for taxing the taxpayer's salary in effect at the time he qualified for office must be taken to have entitled him to his salary at the amount stated, less whatever general federal income taxes might be imposed from time to time. Cf. *Milliken* v. *United States,* 283 U. S. 15. It is of no moment that the taxpayer's salary was freed from tax by Section 22 (a) of the Revenue Act of 1932, c. 209, 47 Stat. 169, and remained free until the enactment of Section 3 of the Public Salary Tax Act of 1939. If Congress could increase the

amount of tax, it could also reimpose the tax after suspending it for a period of time after the taxpayer qualified for office. The taxpayer's reliance on *Booth* v. *United States,* 291 U. S. 339, is misplaced, since that case did not involve a general tax on income, but a measure providing particularly for a reduction in the salaries of federal judges.

2. In view of the manifest correctness of the decision of the court below that this case is controlled by *O'Malley* v. *Woodrough, supra,* it seems unnecessary to state our reasons for believing that the decision in *Evans* v. *Gore, supra,* is no longer tenable. Compare *Oklahoma Tax Comm'n* v. *United States,* 319 U. S. 598, 610.

CONCLUSION

The decision of the court below is correct, involves no conflict in decisions, and does not call for further review. The petition should therefore be denied.

Respectfully submitted.

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AUGUST 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1945